Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

RICHARD D. GRIFFITH, et al.,

Petitioner,

vs.

COLLIER COUNTY, FLORIDA, et al.,

Respondent.

Petition For Writ Of Certiorari To The Florida Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER IT IS IMPERMISSIBLE FOR THE FLORIDA LEGISLATURE TO RETROACTIVELY DIVEST TAXPAYERS OF THEIR VESTED RIGHT TO SEEK A REFUND OF ILLEGALLY COLLECTED TAXES.

LIST OF PARTIES TO THE ACTION

Richard D. Griffith

Hobart C. Bishop

Nancy Contardi

Martin L. Kelley

J.E. Lalman

Thomas Lovinggood

Terry Morris

Diane Morris

Richard Murphy

Horace Renshaw

Wendell Smith, and

Albert M. Tiache, Individually and as Class Representatives for all others similarly situated.

Collier County, Florida

Guy L. Carlton

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Collier County et al. v. Griffith, 635 So.2d 145 (Fla. 2d DCA 1994)

Griffith v. Collier County, Case No. 83,670, Supreme Court of Florida denied jurisdiction on October 5, 1994.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C.A § 1257, the Supreme Court has discretionary jurisdiction to review decisions made by a State's Highest Court. Section 1257 states in pertinent part:

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Supreme Court of Florida declined discretionary jurisdiction to review a decision of the Second District

Court of Appeal of Florida. That decision validated a statute contrary to the laws of the United States; specifically the due process guarantees of the Fourteenth Amendment and the decision of this Court in *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922).

The Supreme Court of the United States may properly exercise its discretion to accept review of this case as the highest court of the state of Florida has rendered a final judgment in this case. See generally *Douglas v. California*, 372 U.S. 353 (1963) (defendants exhausted their state remedies, and their cases were properly before the Supreme Court of the United States on certiorari where following their convictions they appealed as of right to the California district court of appeal, and upon affirmance of their convictions petitioned for further discretionary review in the California Supreme Court but their petitions were denied without further hearing.)

In the present case the Respondents, following a grant of Petitioner's Motion for Summary Judgment in the trial court, filed an appeal with the Second District Court of Florida. The Second District Court reversed the Final Summary Judgment entered by the trial court and the Petitioners then petitioned the Florida Supreme Court for further discretionary review. That petition was denied. As a result a final judgment from the state's highest court has been rendered and this Court therefore has discretionary jurisdiction to review this matter.

In accepting discretionary review, this Court will maintain consistency in its precedent, eliminate conflicting decisions of inferior courts, and guard against the

unlawful arrogation of taxation powers by local governments.

STATUTORY PROVISIONS

Amendment XIV, United States Constitution

AMENDMENT XIV.

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Florida Statutes, § 125.0104

(4) Ordinance levy tax; procedure. –

(a) The tourist development tax shall be levied and imposed pursuant to an ordinance containing the county tourist development plan prescribed under paragraph (c), enacted by the governing board of the county. The ordinance levying and imposing the tourist development tax shall not be effective unless the electors of the county or the electors in the subcounty special district in which the tax is to be levied approve the ordinance authorizing the levy and

imposition of the tax, in accordance with subsection (6). The effective date of the levy and imposition of the tax shall be the first day of the second month following approval of the ordinance by referendum, as prescribed in subsection (6), or the first day of any subsequent month as may be specified in the ordinance. A certified copy of the ordinance shall be furnished by the county to the Department of Revenue within 10 days after approval of such ordinance. The governing authority of any county levying such tax shall notify the department, within 10 days after approval of the ordinance by referendum, of the time period during which the tax will be levied.

* * *

(c) Prior to enactment of the ordinance levying and imposing the tax, the county tourist development council shall prepare and submit to the governing board of the county for its approval a plan for tourist development. The plan shall set forth the anticipated net tourist development tax revenue to be derived by the county for the 24 months following the levy of the tax; the tax district in which the tourist development tax is proposed; and a list, in the order of priority, of the proposed uses of the tax revenue by specific project or special use as the same are authorized under subsection (5). The plan shall include the approximate cost or expense allocation for each specific project or special use.

Florida Laws 1992, c. 92-904, § 2

The governing body of any county that levied a tourist development tax pursuant to s. 125.0104, Florida Statutes, before December 1, 1991, regardless of the effective date of the initial

ordinance, which tax is invalidated or subject to invalidation for failure to follow the requirements of s. 125.0104(4), Florida Statutes, including, but not limited to, the failure of a tourist development council to submit a requisite spending plan for tourist development to the governing body of the county for approval before the ordinance levying the tax was adopted, and that subsequently levies another such tax pursuant to s. 125.0104, Florida Statutes, which tax is approved by a majority vote of the electors of the county voting in a referendum before July 1, 1993, shall use the proceeds of the invalidated tax for the purposes that are authorized in the new levy. If the subsequent tourist development tax is disapproved by a majority of the electors of the county voting in a referendum before July 1, 1993, the proceeds of the tourist development tax which was levied prior to December 1, 1991, and was invalidated or subject to invalidation as a result of a failure to follow the requirements of s. 125.0104(4), Florida Statutes, shall be used for any purpose which was authorized in the initial ordinance. Nothing in this section shall be construed to cure any failure to comply with s. 125.0104(6), Florida Statutes. Laws 1992, c. 92-175, § 2, contains essentially the same provisions.

STATEMENT OF THE CASE AND FACTS

This action was commenced in the Circuit Court of the Twentieth Judicial Circuit in and for Collier County, Florida by Plaintiffs/Petitioners, (hereafter referred to as

"Taxpayers") against Respondents, Collier County, Florida and Guy L. Carlton, as Tax Collector for Collier County, Florida (hereafter referred to as "County"). The action sought a refund of taxes illegally collected by the County. The taxes were levied pursuant to a Local Option Tourist Development Act, § 125.0104, *Florida Statutes* (1990), and Collier County Ordinance 90-43 (hereafter referred to as "Ordinance").

In 1977 the Florida Legislature passed the Tourist Development Act, which authorized counties to impose a tax on living accommodations rented for six months or less. The purpose of the Tourist Development Act was to promote tourism and to benefit tourists. The statute required that certain conditions precedent be met before a county would have authority to levy the tax.

Among these conditions precedent was the requirement that the counties establish an Advisory Tourist Development Council, (hereafter referred to as a "TDC"). The TDC was to prepare a plan for implementing the tax which would then be submitted to the governing board of the county for approval. The language of Florida Statute § 125.0104(4)(a), states:

> The tourist development tax *shall* be levied and imposed pursuant to an ordinance containing the county tourist development plan prescribed under paragraph (c), enacted by the governing board of the county. (emphasis supplied).

Section 4(c) states that:

> Prior to enactment of the ordinance levying and imposing the tax, the county tourist development counsel *shall* prepare and submit to the governing board of the county for its approval a

> plan for tourist development. (emphasis supplied).

In June of 1988, Collier County established a TDC to develop the required plan for the board's review and approval. However no plan was submitted by the TDC. Instead the TDC determined that no tax should be levied in Collier County, Florida.

In July 1990, ignoring both the legislative mandate which required a plan, as well as the recommendation of the TDC not to impose a tax, the County passed an ordinance allowing for the imposition of taxes pursuant to the Act. As a result, operators of various local hotels brought suit against the County seeking injunctive relief from the imposition of the tourist tax on the grounds that it failed to comply with the legislative mandate and was therefore invalid. See *Freni v. Collier County*, 588 So.2d 291 (Fla. 2d DCA 1991).

In *Freni*, the trial court denied the injunctive and declaratory relief requested and the hotel operators appealed. The Second District Court of Appeal of Florida reversed and declared that the legislation specifically required several elements to be addressed in a TDC plan before a tax could be levied. The court held that there was a failure to comply with a necessary condition precedent because none of the required elements were addressed by the TDC. The county therefore had no authority to implement the tax. The Second District Court reasoned that:

> In requiring submission of a plan, the statute speaks in mandatory language using the word "shall" and not "may." Moreover, if the legislature had intended to authorize a county to proceed without the input of the TDC, there would

> have been no need for it to have provided for the appointment of a TDC. (*Freni*, 588 So.2d at 294.) . . . . [W]e must assume the legislature properly expressed its intent in the plain language of the statute, as statutes are to be construed and applied in the form enacted.

The Second District Court granted the relief requested by the Taxpayers. As a result, the Taxpayers filed this action to collect a refund of the invalidly exacted taxes collected by the County.

Shortly after the action for refund was filed, the Florida Legislature enacted the Laws of Florida, ch. 92-204 (1992), (hereafter referred to as "Retroactive Act"). The effect of this special legislation was to allow the County to keep and spend the illegally collected tax money, to retroactively validate the collection of the tourist taxes by the County, and to prevent Taxpayers from collecting the refund sought in this action. Taxpayers amended their complaint and requested that the court declare the Retroactive Act unconstitutional if applied retroactively to divest them of their vested right to collect refunds.

Taxpayers then moved for summary judgment in that action and the County cross-moved for summary judgment. After hearing, the trial court granted the Taxpayer's motion for summary judgment and denied the County's cross motion. The County thereafter appealed that decision to the Second District Court of Appeal of Florida. The Second District Court reversed the trial court's decision and expressly declared that the Retroactive Act was valid and that no refund would be allowed.

The Taxpayers filed a Petition to Invoke the Discretionary Jurisdiction of the Supreme Court of Florida to review this decision on two separate grounds. The first was that the Supreme Court of Florida had discretionary review of decisions of district courts of appeal which expressly declare valid a state statute. The Second District Court of Appeal in this case had expressly declared the 1992 supplement to Section 125.0104, Florida Statutes, to be valid.

The second was that the Supreme Court had discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The Second District Court of Appeal's decision in the instant case directly and expressly conflicts with the decision of the Supreme Court of Florida in *New Smyrna Inlet Dist. v. Esch*, 137 So. 1 (Fla 1931) as well as the decision of this Court in *Forbes Pioneer Boat Line v. Board of Comm'rs*, 258 U.S. 338 (1922). On October 5, 1994, the Supreme Court of Florida declined to accept discretionary jurisdiction to review the case. Thereafter, this Petition for Writ of Certiorari was timely filed.

ARGUMENT

IT IS IMPERMISSIBLE FOR THE FLORIDA LEGISLATURE TO RETROACTIVELY DIVEST TAXPAYERS OF THEIR VESTED RIGHT TO SEEK A REFUND OF ILLEGALLY COLLECTED TAXES

The Supreme Court of the United States may review any decision of a state's highest court that calls into

question the validity of a state statute on the grounds that it is repugnant to the laws of the United States. 28 U.S.C.A. § 1257. In the present case, the Supreme Court of Florida declined review of a decision of the Second District Court of Appeal which expressly declared valid the Retroactive Act. Such statute is contrary to the due process clause of the Fourteenth Amendment as set forth in *Forbes*, 258 U.S. 338 (1922).

The Florida Legislature, when it enacted the Retroactive Act, retroactively validated an invalid statute. The Retroactive Act improperly gave life to the Local Option Tourist Development Act, which in turn had the effect of validating the Collier County Ordinance. The Florida Legislature has no power or authority to retroactively validate an invalid statute. It abused its power by enacting the 1992 Retroactive Act. This Court has ruled that it is inconsistent with due process to take away from a private party a right to recover money that is due when an act is passed. *Forbes*, 258 U.S. at 340.

In this case, the Second District Court of Appeal specifically upheld the Retroactive Act and determined:

> Although the tourist tax [as originally implemented] was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development.

See *Collier County v. Griffith*, 635 So.2d 145 (Fla. 2d DCA 1994).

The Second District erred in its determination that the legislature acted within its capacity by enacting the Retroactive Act. The legislature has no authority to take away from a private party a right to recover money that is due, by enacting legislation which retroactively divests that party of a right to seek a refund of illegally exacted taxes. *Forbes,* 258 U.S. 338. It is now appropriate for this Court to review that decision and to overrule the approval of the Retroactive Act as it is contrary to the laws of the United States as set forth in *Forbes,* 258 U.S. 338.

The operative facts in the *Forbes* case are identical to the case at bar, and show that the case involved the unlawful exaction of monies (tolls) by a political subdivision of the state (a drainage district) from persons using the lock of a canal. That exaction of monies was found invalid by the Supreme Court of Florida. On the day of that decision the Florida Legislature passed an act purporting to validate the collection of those tolls retroactively. That legislation was upheld by the Florida Supreme Court. The Florida Supreme Court decision was then reviewed by this Court in *Forbes.* This Court reversed the Supreme Court of Florida, holding that the legislature could not retroactively permit the District to keep the originally invalid taxes.

The present case is identical to the *Forbes* scenario, both substantively and procedurally. In the case at bar, there was an unlawful exaction of monies, (taxes), by a political subdivision of the state, (the county), from persons paying for lodging. The exaction of that money was found invalid by a court of law. (See *Freni,* 588 So.2d 1054) In response to that decision the Florida legislature

passed an act purporting to validate the collection of those monies notwithstanding the fact that the County was without authority to exact the taxes in the first place.

In each case, a) a political subdivision of the state, b) exacted monies, c) which it had no power to do, and d) the legislature attempted to retroactively validate the collection of those monies. In the present case, as in *Forbes*, the Florida Legislature may not constitutionally take away from a private party the right to recover money that is due when the act is passed. This is so because the right to recover the money is **vested.**

Although it is true that a retroactive act may be Constitutional in some circumstances, it has been held that in order for such legislation to be proper,

(a) it must not be arbitrary and irrational;

(b) it must serve a rational purpose and be justified by rational means; and

(c) it must not be overly harsh or oppressive in its application and effect so that it violates due process.

Canisius College v. United States, 799 F.2d 18, 24 (2d Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987)

The Legislature enacted the Retroactive Act in an arbitrary and irrational way

Retroactive legislation must be remedial in nature *and* the ratifying body must possess the authority to carry out the prior conduct at the time it ratifies the prior conduct. *Forbes*, 258 U.S. at 339. In the *Forbes* case this Court determined that the Florida Legislature could not

compel the *Forbes* plaintiffs to pay in 1919 for a 1917 passage through a canal, "any more effectively than it could have made a man pay a baker for a gratuitous deposit of rolls." (*Forbes*, 258 U.S. at 339).

In the case at bar, the Florida Legislature did not have the power to ratify the collection of the tourist tax by the County during the pendency of *Freni* because it did not have the power to levy the tourist tax originally. Section 125.0104(b), *Florida Statutes*, states that, " . . . any county in this state may levy and impose a tourist development tax on the exercise within its boundaries of the taxable privilege . . . " Nowhere in this section, or in any other in the Florida Statutes, does the Legislature confer in itself the power to levy and impose a tourist development tax. Rather, the power has been specifically conferred upon the counties of Florida to decide whether to levy such a tax, and requires that before any such levy could be made that certain mandatory conditions precedent be met, specifically a plan by the TDC.

The Legislature, in amending § 125.0104, *Florida Statutes*, by its Retroactive Act gave counties the option to levy the tax with or without a plan from a TDC. This provision of the Retroactive Act, applied prospectively, is fully within the power of the Legislature. However, the provision allowing for the retention of monies paid by tourists is retroactive in purpose, and the Legislature must have the power to collect the tax at the time it ratifies its collection. The Legislature did not, at the time the Retroactive Act was passed, have the power to levy a tourist development tax. (See *Freni*, 588 So.2d 291). Therefore, the retrospective provision of the Retroactive Act is arbitrary and irrational since the Legislature had no

power to levy a tourist development tax when the Retroactive Act was passed.

The Retroactive Act serves no rational purpose

A statute may have retroactive effect, but, "the retroactive application of the statute must be justified by a rational purpose." *Canisius College*, 799 F.2d at 25. Put another way, "a retroactive statute is constitutional if retroactive application is justified by a legitimate legislative purpose furthered by rational means." *Id.*

The preamble to the Retroactive Act states several legislative purposes. In this case, the only portion of the preamble necessary for review is:

> . . . authorizing the governing body of a county that levied a tourist development tax before a certain date, which tax is invalidated because a specified condition precedent to the levy of the tax was not complied with before the ordinance levying the tax was adopted, and that levies another such tax in accordance with general law, which tax is approved by the voters of that county before a certain date, to use the proceeds from the invalidated tax for the purposes authorized in the new levy; providing for use of such invalidated tax for the purposes authorized in the initial ordinance if the referendum on the new levy is disapproved . . . § 125.0104(3)(a), Florida Statutes.

The purpose of the Retroactive Act, as it relates to the case at bar, is to ratify an illegal and invalid tax levy. This purpose is *not* a legitimate legislative purpose that is being achieved by rational means. It is an imposition of a

retroactive law that taxes Taxpayers for events that took place two years prior to the enactment of the curative act.

In *Graham v. Goodcell*, 282 U.S. 409 (1931), this Court draws a distinction between valid remedial legislation and legislation designed to create liabilities for past transactions. Plaintiff's in *Graham* sued the Internal Revenue Service for a refund of certain taxes that were paid. This Court ultimately held no refund was owed to plaintiffs, but in its decision, this Court specifically delineated when legislation could and could not be applied retroactively. The decision stated:

> . . . a distinction is made between a bare attempt of the legislature to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice. *Id.* at 429.

In disallowing a refund for plaintiff taxpayers this court emphasized the fact that the Treasury Department made an error in believing that the statute of limitations would be tolled if a review of an assessment was requested by a taxpayer. Such was not the case, and when final review of the assessment went against plaintiff taxpayers, they affirmatively alleged that the Treasury Department was precluded from suing for the taxes. Congress then passed curative legislation allowing for the collection of said taxes. This Court, in upholding the curative legislation, stated:

> . . . petitioners had been indebted to the Government for the amount which was subsequently

> collected. They [petitioners] had asked for a review of the assessment and collection was postponed. The Treasury Department had *mistakenly* assumed that the statute of limitations did not apply to distraint proceedings and before the *mistake* was discovered the period of limitation had expired. (emphasis added).

As is illustrated by this Court's decision in *Graham*, the legislature may remedy *mistakes and defects* in the administration of legislation. Such remedial measures serve a legitimate and rational government purpose. In the case at bar, however, the Retroactive Act is not directed at remedying administrative mistakes and defects. Rather, it seeks to ratify the unconstitutional exercise of power by the County.

The Tourist Development Act specifically and unequivocally stated that before any tax could be levied, the TDC *"shall submit a plan"* to the county government that, at minimum, discussed certain impacts the tax would create. No plan from the TDC was submitted. The County took it upon itself, knowing full well that a plan was a mandatory condition precedent to the levy of a tax, to impose a tourist tax. This is an outright arrogation of power by the County. As the court held in *Freni*, the statute's language is mandatory and not discretionary. No administrative mistake was committed by the County. Instead the County completely disregarded the requirements contained in the statute. The Retroactive Act cannot be seen as a mere attempt by the Legislature to remedy a mistake or defect. Rather it attempts to retroactively validate an invalid tax which in this case it has no power to do.

The Retroactive Act is overly harsh and oppressive to Taxpayers

In determining whether retroactive legislation is overly harsh and oppressive we must look at whether the retroactive effect of the legislation will abrogate vested rights. *Canisius*, 799 F.2d at 24. If there is an abrogation of vested rights then the retroactive legislation is overly harsh and oppressive in violation of due process. *Id.*

Notwithstanding the above factors, no legislation can be given retroactive effect if it will impose a new duty or obligation, or if it interferes with a vested right that has accrued. If a right has accrued then that right may not be abrogated by retroactive legislation. "Generally ratification of an act is not good if attempted at a time when the ratifying authority could not lawfully do the act." *Forbes*, 258 U.S. at 339 (citations omitted).

The Retroactive Act is invalid because it deprived the Taxpayers of a vested right to recover monies in violation of the due process guarantees of the Fourteenth Amendment. The general rule is that "it is not consistent with due process to take away from a private party a right to recover the amount that is due when the act is passed." *Graham*, 282 U.S. at 429. "A void tax levy cannot be legalized by statutory ratification when substantial property rights would thereby be violated." *Forbes*, 258 U.S. at 339. The Taxpayers had a right to sue for a refund in April 1992 when the Retroactive Act was passed. They were entitled to recover the paid taxes when the court in *Freni* determined that the levy was unauthorized. Their claim for monies wrongfully exacted was vested and, as a

result, may not be constitutionally extinguished. *Graham*, 282 U.S. at 429.

It is true that absent a vested right, the legislature may, under certain circumstances, properly validate a tax through retroactive legislation. However it is proper only in those cases where the statute is designed to remedy "mistakes and defects in the administration of government" and where the claimed right is not "linked to any substantial equity." *Id.*

In the instant case, the County did not make a mistake. Rather, it arrogated to itself the authority to ignore the legislative mandate requiring the TDC to submit a plan as a condition precedent to its power to levy the tax. Thus the tax was imposed without any color of lawful authority. There was nothing curative about the Retroactive Act. Its purpose was solely to permit the County to keep revenues that it was not authorized to collect in the first place.

The Florida Legislature has no power or authority to retroactively validate an invalid statute. It therefore abused its power by enacting the 1992 Retroactive Act. By doing this the Florida Legislature and the Florida Courts have retroactively imposed a tax contrary to the laws of the United States.

CONCLUSION

Based upon the foregoing, the Supreme Court has jurisdiction to review this matter. The Second District Court of Appeal has improperly declared valid a state statute as well as rendered a decision directly and expressly in conflict with a decision of this Court. In order to promote uniformity and to control legislative overreaching, this Court should elect to exercise its jurisdiction in the premises.

Respectfully submitted,

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IN THE CIRCUIT COURT IN AND FOR
COLLIER COUNTY, FLORIDA

JOSEPH FRENI, JR., et al.,

Plaintiffs

vs.

COLLIER COUNTY, FLORIDA, et al,

Defendants

CONSOLIDATED

CASE NOS.
90-2182 CA-01TSR
92-0419 CA-01WLB
92-0791-CA-01HDH

RICHARD D. GRIFFITH, et al,

Plaintiffs,

vs.

GUY L. CARLTON,

Defendants

_____/

HOBART C. BISHOP, et al.

Plaintiffs,

vs.

RICHARD S. SHANAHAN, et al.

Defendants,

_____/

AMENDED FINAL SUMMARY JUDGMENT

THIS CAUSE having come on for hearing before the undersigned upon the Cross-Motions for Summary Judgment filed by the parties, and the Court having reviewed the memoranda submitted by counsel in support of their respective positions and having considered the arguments of counsel at the hearing, it is hereby

ORDERED:

1. The Motion for Summary Judgment of plaintiffs HOBERT [sic] C. BISHOP, et al., and of RICHARD D. GRIFFITH, et al., be and the same is hereby GRANTED, and the Cross-Motion for Summary Judgment of the defendants, COLLIER COUNTY and RICHARD SHANAHAN, et al., be and the same is hereby DENIED.

2. The Court hereby enters judgment for plaintiffs on the issue of liability on the part of Collier County for the refund of the disputed taxes.

3. The Court hereby reserves jurisdiction of this cause for the purpose of administering the distribution and refund of the tax proceeds which are the subject matter of this case to the members of the class certified herein and for the purpose of awarding plaintiffs' counsel reasonable attorneys' fees plus costs in connection with this action and to enter such other orders as may be deemed proper or necessary in order to effectuate this judgment.

DONE AND ORDERED this ___ day of December, 1993, in Chambers at Fort Myers, Florida.

Thomas S. Reese, Chief Judge

Copies to:
Gregory W. Hootman, Esq.
Timothy R. Parry, Esq.
Michael R. N. McDonnell, Esq.
Cathy Reiman, Esq.
Michael Provost, Esq.
Gerald S. Livingston, Esq.
Kenneth B. Cuyler, Esq.

COLLIER COUNTY, Florida, Guy L. Carlton, as Tax Collector of Collier County, Richard S. Shanahan, Michael J. Volpe, Patricia Anne Goodnight, Burt L. Saunders and Max A. Hasse, as Commissioners of Collier County and Mary Morgan, as Supervisor of Elections of Collier County, Appellants,

v.

Joseph FRENI, Jr., the Ritz-Carlton Hotel, the Naples Golf and Beach Club, Inc., Van-Dev, Inc., d/b/a Vanderbilt Inn On The Gulf, Marriott's Marco Island Resort, Inc., La Playa Associates, Inc., Marco Bay Resort, Inc., DT Hotel Development Corporation, d/b/a Edgewater Beach Hotel, Olde Naples Land Partners, Ltd., d/b/a Howard Johnson's Lodge and Bomark, Inc., d/b/a Trails End Motel, and Richard D. Griffith, Individually and as class representative of all others similarly situated, Hobart C. Bishop, Nancy Contardi, Martin L. Kelley, J.E. Lalman, Thomas Lovinggood, Terry Morris, Diane Morris, Richard Murphy, Horace Renshaw, Wendell Smith and Albert M. Tiache, Individually, and on behalf of all other persons similarly situated, Appellees.

No. 93-00639.

District Court of Appeal of Florida,
Second District.

April 15, 1994.

Taxpayers sought refunds of local taxes levied under invalidated ordinance permitting local tourist development tax. The Circuit Court, Collier County, Thomas S. Reese, J., awarded taxpayers refunds, and county officials

appealed. The District Court of Appeal, Ryder, J., held that where legislature had power in first instance to confer on counties power to impose and collect tourist tax, tax initially imposed by county was not void, although it was subject to invalidation for failure to follow procedural requirements of Local Option Tourist Development Act, and thus legislature acted within its capacity in ratifying tax by providing means to correct procedural defect of absence of plan for tourist development.

Reversed and remanded.

Kenneth B. Cuyler, County Atty., Naples and Gary L. Sasso and Sylvia H. Walbolt, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for appellants.

Michael R.N. McDonnell, McDonnell Law Offices, Naples, for appellee Richard D. Griffith.

Timothy R. Parry, Harter, Secrest & Emery, Naples, for appellees Hobart C. Bishop, Nancy Contardi, Martin L. Kelley, J.E. Lalman, Thomas Lovinggood, Terry Morris, Diane Morris, Richard Murphy, Horace Renshaw, Wendell Smith and Albert M. Tiache.

RYDER, Judge.

Appellants challenge the final summary judgment awarding taxpayers refunds of local taxes levied under an invalidated ordinance. We reverse.

This is the third time this court has reviewed the proceedings in the circuit court regarding Collier County's ordinance no. 90-43. *See Freni v. Collier County,* 573 So.2d 1054 (Fla. 2d DCA 1991) (*Freni I*); *Freni v. Collier County,* 588 So.2d 291 (Fla. 2d DCA 1991) (*Freni II*). The

ordinance permitted a local tourist development tax authorized by the Local Option Tourist Development Act (the Act), section 125.0104, Florida Statutes (1987). The circuit court initially upheld the ordinance despite the absence of a plan for tourist development as required by section 125.0104(4), Florida Statutes (1987). This court held that the submission of a plan was a necessary condition precedent to the levy of the tax and reversed the circuit court. *See Freni II.*

Before *Freni II* issued and before the county began collecting the tax, various hotel operators filed a declaratory relief action seeking to bar the operation of the ordinance. After the issuance of *Freni II,* the taxpayers sued for refunds of the taxes collected prior to that decision. The circuit court consolidated the hotel operators' and taxpayers' cases.

While the consolidated cases proceeded in the circuit court, the legislature passed a curative act. *See* § 125.0104, Fla.Stat. (1992 Supp.). The 1992 amendment ratified previously imposed taxes which were subject to invalidation for failure to follow certain requirements, including the requirement that the tourist development council submit a plan for tourist development. Subsequent to the amendment, a majority of the voters in the referendum held in Collier County approved another tourist tax. The tax was levied in accordance with the Act as amended. The circuit court, nevertheless, awarded the taxpayers refunds.

We find *United States v. Heinszen,* 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098 (1907), controlling. Where the authority exists in the first instance to confer the taxing

power, the tax thereafter imposed is not void. *See Heinszen.* If the tax is not void, then the legislature may ratify the tax. *See Heinszen.*

The legislature had the authority in the first instance to confer on counties the power to impose and collect a tourist tax. Given the initial valid exercise of the legislature's authority, the tax as initially imposed was not void, as was the tax in the *New Smyrna Inlet Dist. v. Esch,* 103 Fla. 24, 137 So. 1, *reh'g denied,* 103 Fla. 24, 138 So. 49 (1983). Although the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development.

Accordingly, we reverse the circuit court's order awarding refunds to the taxpayers and remand the case for further proceedings consistent with this opinion.

Reversed and remanded.

FRANK, C.J., and BLUE, J., concur.

Supreme Court of Florida

WEDNESDAY, OCTOBER 5, 1994

RICHARD D. GRIFFITH, ET AL., Petitioners,	*	CASE NO. 83,670
v.	*	DISTRICT COURT OF APPEAL, 2ND DISTRICT NO. 93-00639
COLLIER COUNTY, FLORIDA, ET AL., Respondents.	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

GRIMES, C.J., OVERTON, SHAW, KOGAN and HARDING, JJ., concur

A True Copy

TEST:

(Seal)

/s/ Sid J. White
Sid J. White
Clerk, Supreme Court

BH

cc: Hon. William A. Haddad, Clerk
Hon. Dwight E. Brock, Clerk
Hon. Thomas S. Reese, Judge

Mr. Timothy R. Parry
Mr. Kenneth B. Cuyler
Ms. Sylvia H. Walbolt
Mr. Alan C. Sundberg
Mr. Gary L. Sasso
Mr. Michael R. N. McDonnell
Ms. Mellissa A. Gay

ORDINANCE NO. 90-43

AN ORDINANCE TO LEVY, IMPOSE AND SET A THREE PERCENT (3%) TOURIST DEVELOPMENT TAX THROUGHOUT COLLIER COUNTY PURSUANT TO THE "LOCAL OPTION TOURIST DEVELOPMENT ACT", CHAPTER 125.0104, FLORIDA STATUTES; PROVIDING FOR THE COLLECTION OF SAID TAX; PROVIDING FOR A TAX ON EACH WHOLE AND MAJOR FRACTION OF EACH DOLLAR OF THE TOTAL RENTAL CHARGED EVERY PERSON WHO RENTS, LEASES OR LETS FOR CONSIDERATION ANY LIVING QUARTERS OR ACCOMMODATIONS IN ANY HOTEL, APARTMENT HOTEL, MOTEL, RESORT MOTEL, APARTMENT, APARTMENT MOTEL, ROOMING HOUSE, MOBILE HOME PARK, RECREATIONAL VEHICLE PARK, OR CONDOMINIUM FOR A TERM OF SIX (6) MONTHS OR LESS; PROVIDING THAT THE REVENUES SO RAISED BE UTILIZED TO IMPLEMENT THE COLLIER COUNTY TOURIST DEVELOPMENT PLAN; SETTING FORTH AND PROVIDING FOR THE ADOPTION OF THE COLLIER COUNTY TOURIST DEVELOPMENT PLAN; PROVIDING FOR A REFERENDUM ON THE TOURIST DEVELOPMENT TAX; ESTABLISHING A COLLIER COUNTY TOURIST DEVELOPMENT COUNCIL; PROVIDING FOR THE MEMBERSHIP, TERMS, QUALIFICATIONS, AND POWERS OF THE MEMBERS OF SAID COUNCIL; PROVIDING FOR PENALTIES FOR MISREPRESENTATION REGARDING COLLECTION OF THE TAX LEVIED; PROVIDING FOR COLLECTION BY LIEN; PROVIDING FOR PENALTIES FOR FAILURE TO COLLECT THE TAX LEVIED; PROVIDING FOR REPEAL

OF THE TAX BY REFERENDUM ELECTION; PROVIDING FOR LOCAL COLLECTION AND ADMINISTRATION OF THE TAX; REPEALING COLLIER COUNTY ORDINANCE NO. 88-58; PROVIDING FOR SEVERABILITY OF ORDINANCE PROVISIONS; AND SETTING FORTH AN EFFECTIVE DATE.

WHEREAS, Chapter 125.0104, Florida Statutes, provides for the levy of a local option tourist development tax by any county; and

WHEREAS, pursuant to the provisions of said statute, the Board of County Commissioners of Collier County, Florida on June 20, 1988 adopted an ordinance establishing a Collier County Tourist Development Council and stating the Board of County Commissioners' intention to consider the enactment of an ordinance levying and imposing a tourist development tax; and

WHEREAS, said Collier County Tourist Development Council has presented to the Board of County Commissioners its plan regarding tourist development; and

WHEREAS, the Board of County Commissioners then considered and modified the county plan for tourist development; and

WHEREAS, it is the intent of the Board of County Commissioners of Collier County, Florida to enact an ordinance levying and imposing a tourist development tax throughout Collier County, said tax to be used for the purposes permitted by Chapter 125.0104, Florida Statutes, as amended.

NOW, THEREFORE BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF COLLIER COUNTY, FLORIDA that:

SECTION ONE: TOURIST DEVELOPMENT TAX

A. There is hereby levied, imposed and set a tourist development tax throughout the geographic area of Collier County, Florida at a rate of three percent (3%) of each whole and major fraction of each dollar of the total consideration charged every person who rents, leases or lets for consideration any living quarters or accommodations in any hotel, apartment hotel, motel, resort motel, apartment, apartment motel, rooming house, mobile home park, recreational vehicle park, or condominium for a term of six (6) months or less, unless such person rents, leases, or lets for consideration any living quarters or accommodations which are exempt according to the provisions of Chapter 212, Florida Statutes. When receipt of consideration is by way of property other than money, the tax shall be levied and imposed on the fair market value of such non-monetary consideration.

B. The tourist development tax shall be in addition to any other tax imposed pursuant to Chapter 212, Florida Statutes, and in addition to all other taxes, fees and the considerations for the rental or lease.

C. The tourist development tax shall be charged by the person receiving the consideration for the lease or rental, and it shall be collected from the lessee, tenant, or customer at the time of payment for the consideration for such lease or rental.

D. The State of Florida, Department of Revenue shall keep records showing the amount of taxes collected, which shall also include records disclosing the amount of taxes collected for and from each county in which the tax authorized by this act is applicable. These records shall be open for inspection during the regular office hours of the said Department of Revenue subject to the provision of Chapter 213.053, Florida Statutes.

E. The Collier County Tax Collector shall be responsible for the collection and administration of the tax. Collections received by the Tax Collector shall be placed in the County tourist development trust fund, which shall be established by resolution of the Board of County Commissioners prior to receipt of any tax revenues collected pursuant to this ordinance.

SECTION TWO: USES OF TAX REVENUES

A. The tax revenues received pursuant to this ordinance shall be used to fund the Collier County Tourist Development Plan, which is hereby adopted as follows:

TOURIST DEVELOPMENT PLAN

The three percent (3%) tourist development tax shall be levied throughout Collier County beginning the first day of the second month following approval of this ordinance by referendum. The tax district shall include the entire geographic area of Collier County, Florida. The anticipated revenue for a three percent (3%) tourist development tax for all of Collier County over a twenty-four (24) month period is $9,000,000.00 less costs of administration.

1. The categories of use of the three percent (3%) tax revenues by specific project or special use are hereby listed in the order of priority and include the approximate cost or expense allocation for a twenty-four (24) month period for each project or use as follows:

CATEGORY A – To finance beach improvement, maintenance, renourishment, and restoration, including pass maintenance.

Approximate cost or expense allocation	Percentage of Net revenue
$4,000,000	44%

CATEGORY B – To develop and fund cultural and fine arts entertainment, festivals and programs.

Approximate cost or expense allocation	Percentage of Net revenue
$1,000,000	11%

CATEGORY C – To construct a publicly owned and operated sports stadium.

Approximate cost or expense allocation	Percentage of Net revenue
$3,000,000	33%

CATEGORY D – To promote and advertise county tourism which encourages off-season tourists to visit Collier County.

Approximate cost or expense allocation	Percentage of Net revenue
$500,000	6%

CATEGORY E – To construct maintain, operate, or promote museums, nature and wildlife preserves, aquatic preserves, or environmental preserves which are publicly owned and operated or owned and operated by a not-for-profit-organization and open to the public.

Approximate cost or expense allocation	Percentage of Net revenue
$500,000	6%

2. Pursuant to Section (3)(1) of Chapter 125.0104, Florida Statutes, one percent (1%) of the three percent (3%) tourist development tax is imposed for the purpose of and in order to pay the debt service on bonds issued to finance the construction, reconstruction, or renovation of a professional sports franchise facility.

3. The revenues to be derived from the tourist development tax may be pledged to secure and liquidate revenue bonds in accordance with the provisions of Section 125.0104, Florida Statutes. Such revenue bonds and revenue refunding bonds may be authorized and issued in such principal amounts, with such interest rates and maturity dates, and subject to such other terms, conditions and covenants as the governing board of Collier County shall provide. This paragraph shall be full and complete authority for accomplishing such purposes, but such authority shall be supplemental and additional to, and not in derogation of, any powers now existing or later conferred under law.

4. In the event bonds are issued by Collier County for any of the purposes enumerated by the Tourist Development Plan, the amount of tourist development tax receipts used to pay debt service on such bonds may

exceed the percentages provided for the purpose for which such bonds were issued; provided, however, the maximum annual debt service on such bonds, together with any other obligations of Collier County which were issued to finance improvements for the same purpose and which are secured by the tourist development tax, must not exceed the stated percentage of tourist development tax receipts provided in the Tourist Development Plan for such purpose, as calculated as of the date of sale of such bonds. For purposes of performing the calculations described in this paragraph, the amount of tourist development tax receipts shall be assumed to be the amount provided as such in Collier County's immediately preceding annual audit, plus, if the levy of such tax was imposed or increased subsequent to the beginning of the period which was audited, an amount equal to the estimate by the County Manager of the moneys the County would have received if the tax imposition or increase had been in effect during the entire audit period. At or prior to the issuance of bonds the County Manager shall provide a certificate as to the findings required in this paragraph, which certificate shall be conclusive as to all matters provided therein.

B. The above and foregoing Tourist Development Plan may not be substantially amended except by ordinance enacted by an affirmative vote of a majority plus one additional member of the Board of County Commissioners.

SECTION THREE: BALLOT QUESTION

Pursuant to Chapter 125.0104, Florida Statutes, at the next regular or special election to be held in Collier

County, the Board of County Commissioners shall cause to be placed on the ballot the question of the approval or disapproval of this ordinance, such question to appear on the ballot substantially as follows:

_____ FOR THE TOURIST DEVELOPMENT TAX

_____ AGAINST THE TOURIST DEVELOPMENT TAX

SECTION FOUR: TOURIST DEVELOPMENT COUNCIL

There is hereby established, pursuant to the provisions of Chapter 125.0104, Florida Statutes, an advisory council to be known as the "Collier County Tourist Development Council". The council shall be composed of nine members who shall be appointed by the Board of County Commissioners by resolution. The Chairman of the Board of County Commissioners or any other member of the Board of County Commissioners as designated by the Chairman shall serve on the council. Two members of the council shall be elected municipal officials, one of whom shall be from the most populous municipality in the county. Three members of the council shall be owners or operators of motels, hotels, recreational vehicle parks, or other tourist accommodations located in Collier County and subject to the tax hereby levied. Three members of the council shall be persons who are involved in the tourist industry and who have demonstrated an interest in tourist development, but who are not owners or operators of motels, hotels, recreational vehicle parks, or other tourist accommodations in Collier County. All members of the council shall be electors of the county. The members of the council shall serve for staggered terms of four

(4) years. The Board of County Commissioners shall have the option of designating the Chairman of the council or allowing the council to elect a Chairman. The Chairman shall be appointed or elected annually and may be re-elected or re-appointed.

The council hereby established shall meet at least once each quarter and, from time to time, make recommendations to the Board of County Commissioners for the effective operation of the special projects or for uses of the tourist development tax revenues raised by the tax hereby levied and may perform such other duties or functions as hereinafter may be prescribed by ordinance or resolution.

The council shall continuously review all expenditures of revenues from the tourist development trust fund and shall receive, at least quarterly, expenditure reports from the Board of County Commissioners or its designee. The council shall report to the Board of County Commissions and the Department of Revenue any expenditures of said revenues believed to be unauthorized by the provisions of this ordinance. The Board of County Commissioners, upon receiving notification of expenditures believed by the council to be unauthorized, shall review the council's findings and take such administrative or judicial action as it sees fit to insure compliance with this ordinance and the provisions of Chapter 125.0104, Florida Statutes.

SECTION FIVE: PENALTIES FOR FAILURE TO COLLECT

Any person who is taxable hereunder who fails or refuses to charge and collect from the person paying any

rental or lease the taxes herein provided, either by himself or through his agents or employees, is, in addition to being personally liable for the payment of the tax, guilty of a misdemeanor of the first degree, punishable as provided in Section 775.082, Section 775.083 or Section 775.084, Florida Statutes.

SECTION SIX: PENALTIES FOR MISREPRESENTATION

No person shall advertise or hold out to the public in any manner, directly or indirectly, that he will absorb all or any part of the tax, or that he will relieve the person paying the rental of the payment of all or any part of the tax, or that the tax will not be added to the rental or lease consideration, or when added, that it or any part thereof will be refunded or refused, either directly, or indirectly, by any method whatsoever. Any person who willfully violates any provision of this subsection shall be guilty of a misdemeanor of the first degree, punishable as provided in Section 775.082, Section 775.083 or Section 775.084, Florida Statutes.

SECTION SEVEN: LIENS AUTHORIZED

The tax hereby levied shall constitute a lien on the property of the lessee, customer or tenant in the same manner as, and shall be collectible as are, liens authorized and imposed in Chapters 713.67, 713.68 and 713.69, Florida Statutes.

SECTION EIGHT: REPEAL BY REFERENDUM

Upon the filing of a petition signed by fifteen percent (15%), or more, of the electors of Collier County, the Board of County Commissioners shall cause an election to be held for the repeal of the tax, which election shall be

subject only to any outstanding revenue bonds for which the tax has been pledged.

SECTION NINE: LOCAL ADMINISTRATION OF THE TAX

A. Notwithstanding any provisions hereof to the contrary, it is the intent of the County to be exempted from those requirements of Chapter 125.0104, Florida Statutes, that the tax collected be remitted to the Department of Revenue before being returned to the County. It is the intent for the County to provide for the collection and administration of the tax on a local basis.

B. The County assumes responsibility for auditing the records and accounts of dealers, and assessing, collecting, and enforcing payment of delinquent tourist development taxes. The County adopts any and all powers and authority granted to the State of Florida in Chapter 125.0104, Florida Statutes, and Chapter 212, Florida Statutes, to determine the amount of the tax, penalties and interest to be paid by each dealer and to enforce payment of such tax, penalties, and interests by, but not limited to, distress warrants, writ of garnishments and criminal penalties as provided in Chapter 212, Florida Statutes.

C. Initial collection of the tax shall continue to be made in the same manner as the tax imposed under Part I of Chapter 212.

D. The Collier County Tax Collector shall be responsible for the collection and administration of the tax. The person receiving the consideration for such rental or lease shall receive, account for, and remit the tax

to the Collier County Tax Collector. The Tax Collector shall keep appropriate records of said funds. The same duties and privileges imposed by Chapter 212, Florida Statutes, upon dealers in tangible property, respecting the collection and remission of tax, the making of returns, the keeping of books, records and accounts, the payment of a dealer's credit in compliance with the rules of the Department of Revenue in the administration of said chapter shall apply to and be binding upon all persons who are subject to the provisions of this ordinance; provided, however, the said Collier County Tax Collector may authorize a quarterly return and payment when the tax remitted by the person receiving the consideration for such rental or lease for the preceding quarter did not exceed $25.00.

E. The Collier County Tax Collector may promulgate rules, prescribe and publish the forms necessary to effectuate this ordinance.

F. The Collier County Tax Collector shall perform the enforcement and audit functions associated with the collection and remission of this tax, including, without limitation, the following:

1. For the purpose of enforcing the collection of the tax levied by this ordinance, the Tax Collector is hereby specifically authorized and empowered to examine at all reasonable hours the books, records, and other documents of all dealers, or other persons charged with the duty to report or pay a tax under this ordinance, in order to determine whether they are collecting the tax or otherwise complying with this ordinance. In the event said dealer refuses to permit such examination of its books,

records or other documents by the Tax Collector as aforesaid, it is guilty of a misdemeanor of the second degree, punishable as provided in Chapter 775.083, Florida Statutes. The Tax Collector shall have the right to proceed in Circuit Court to seek a mandatory injunction or other appropriate remedy to enforce its right against the offender, as granted by this section, to require an examination of the books and records of such dealer.

2. Each dealer, as defined by statute, shall secure, maintain, and keep for a period of three years a complete record of rooms or other lodging, leased or rented by said dealer, together with gross receipts from such sales, and other pertinent records and papers as may be required by the Tax Collector for the reasonable administration of this ordinance; and all such records which are located or maintained in this state shall be open for inspection by the Tax Collector at all reasonable hours at such dealer's place of business located in the county. Any dealer who maintains such books and records at a point outside this county must make such books and records available for inspection by the Tax Collector in Collier County, Florida. Any dealer subject to these provisions of this ordinance, who violates these provisions is guilty of a misdemeanor of the second degree, punishable as provided in Chapter 775.082 or Chapter 775.083. Florida Statutes.

3. (a) The Tax Collector shall send written notification, at least 30 days prior to the date an auditor is scheduled to begin an audit, informing the taxpayer of the audit. The Tax Collector is not required to give 30 days prior notification of a forthcoming audit in any instance in which the taxpayer requests an emergency audit.

(b) Such written notification shall contain:

(i) The approximate date on which the auditor is scheduled to begin the audit.

(ii) A reminder that all of the records, receipts, invoices, and related documentation of the taxpayer must be made available to the auditor.

(iii) Any other requests or suggestions the Tax Collector may deem necessary.

4. In addition to criminal sanctions, the Tax Collector is empowered and it shall be his duty, when any tax becomes delinquent or is otherwise in jeopardy under this ordinance, to issue a warrant for the full amount of the tax due or estimated to be due, with the interest, penalties, and cost of collection, directed to all and singular the sheriffs of the state, and shall record the warrant in the public records of the county, and thereupon the amount of the warrant shall become a lien on any real or personal property of the taxpayer in the same manner as a recorded judgment. The Tax Collector may issue a tax execution to enforce the collection of taxes imposed by this ordinance and deliver it to the sheriff. The sheriff shall thereupon proceed in the same manner as prescribed by law for executions and shall be entitled to the same fees for his services in executing the warrant to be collected. The Tax Collector may also have a writ of garnishment issued regarding any goods, money, chattels, or effects of the delinquent dealer which are in the hands, possession, or control of a third person based on an indebtedness owed to the delinquent dealer by the third person, to enforce collection of the taxes in the manner provided by law. Upon payment of the execution,

warrant, judgment, or garnishment, the Tax Collector shall satisfy the lien of record within 30 days.

G. Tax revenues may be used only in accordance with the provision of Chapter 125.0104, Florida Statutes.

H. A total of three percent (3%) of said tax collected herein shall be retained by the Tax Collector for costs of administration. The remainder of the tax collected shall be submitted to the County on a monthly basis.

SECTION TEN: REPEAL OF ORDINANCE NO. 88-58

Collier County Ordinance No. 88-58, which sets forth the Board of County Commissioners' intention to consider imposition of a tourist development tax is hereby repealed in its entirety.

SECTION ELEVEN: CONFLICT AND SEVERABILITY

In the event this ordinance conflicts with any other ordinance of Collier County or other applicable law, the more restrictive shall apply. If any phrase or portion of this ordinance is held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision and such holding shall not affect the validity of the remaining portion.

SECTION TWELVE: EFFECTIVE DATE

The effective date of this ordinance shall be immediately upon its being filed with the Office of the Secretary of State in Tallahassee, Florida following approval of the ordinance by referendum election, held for the purpose of approving or rejecting this ordinance, by a majority of the electors voting in such referendum election.

Upon approval by referendum, a certified copy of this ordinance shall be furnished to the Department of Revenue, State of Florida. The effective date of the levy and imposition of the tax shall be the first day of the second month following approval of this ordinance by the above-referenced referendum election.

PASSED AND DULY ADOPTED by the Board of County Commissioners of Collier County, Florida, this 29th day of May, 1990.

BOARD OF COUNTY
COMMISSIONERS OF
COLLIER COUNTY, FLORIDA

By: /s/ Max A. Hasse Jr.
MAX A. HASSE, JR.,
Chairman

[SEAL]
ATTEST:
JAMES C. GILES, Clerk

By: /s/ Illegible

Approved as to form and
legal sufficiency:

/s/ Brenda C. Wilson
Brenda C. Wilson
Assistant County Attorney

This ordinance filed with the Secretary of State's Office the 6th day of June, 1990 and acknowledgement of that filing received this 8th day of June 1990

By /s/ Illegible
Deputy Clerk

Supreme Court, U.S.
FILED
JAN 30 1995
CLERK OF THE CLERK

(2) (3)

No. 94-1174 and No. 94-1177

In The
Supreme Court of the United States
October Term, 1994

RICHARD D. GRIFFITH, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

and

HOBART C. BISHOP, et al.

Petitioners,

vs.

COLLIER COUNTY, FLORIDA, et al.

Respondents.

RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT, STATE OF FLORIDA

January 27, 1995

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BEST AVAILABLE COPY

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QUESTION PRESENTED

Whether the Florida Second District Court of Appeal correctly determined that the Florida Legislature did not violate petitioners' due process rights when the Legislature ratified a tax that Collier County, Florida had levied and collected in a procedurally defective manner under state legislative taxing authority, where it is undisputed that the Legislature could have authorized the County to levy the tax in the manner it did in the first place and where the Legislature acted to ratify the tax after petitioners commenced suit seeking refunds but before petitioners prosecuted their refund claims to judgment.

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JURISDICTIONAL STATEMENT

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257 to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." As petitioners describe, the Florida Second District Court of Appeal disposed of petitioners' constitutional challenge to the validity of the legislation at issue in this case. Following that, the Florida Supreme Court declined to grant discretionary review of the Second District's decision. Accordingly, although petitioners Richard D. Griffith, et al., have styled their petition as a "Petition for Writ of Certiorari to the Florida Supreme Court," petitioners in fact seek review of the Second District's decision rejecting petitioners' constitutional challenge.

In its decision, the Second District reversed the trial court's order granting petitioners' motion for summary judgment on the issue of liability on the part of Collier County for the refund of the disputed taxes. The Second District remanded the case "for further proceedings consistent with" the Second District's opinion. (Appendix to Petition of Hobart C. Bishop, et al., A-5). Although the Second District's opinion contemplates that further proceedings will occur in the trial court, as a practical matter the Second District's determination that the Florida Legislature's action in ratifying the disputed taxes was constitutional disposes of petitioners' claim for refunds. Accordingly, entry of judgment for respondents in the trial court should amount to a ministerial act. In these circumstances, the Second District's determination of this cause may be deemed a "final judgment." E.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 479 (1975); Robert L. Stern, Eugene Gressman, et al., Supreme Court Practice, § 3.6, p. 100 (Bureau of National Affairs, 7th ed. 1993).

STATEMENT OF THE CASE AND FACTS

Petitioners ask this Court to grant a writ of certiorari to review the decision of the Florida Second District Court of Appeal reversing the trial court's summary judgment upholding petitioners' claims to the refund of taxes collected by respondent Collier County. The background of this dispute may be briefly stated.

In 1990, Collier County enacted Ordinance No. 90-43 providing for the collection of taxes from persons renting accommodations in the County. The County enacted Ordinance 90-43 pursuant to the Local Option Tourist Development Act (the "Tourist Development Act"), Section 125.0104, Fla. Stat. (1987). Before the County began collecting the tax, various hotel operators brought suit in the trial court to invalidate the tax on the ground that, in enacting Ordinance No. 90-43, the County had omitted a procedural step provided for in Section 125.0104(4) of the Tourist Development Act: namely, the County did not first obtain a plan for implementing the tax from an advisory body called the "tourist development council."

The hotel operators' suit called upon the court to construe the section of the Tourist Development Act captioned "Ordinance Levy Tax; Procedure." Section 125.0104(4), Fla. Stat. (1987) (emphasis added). This section prescribed certain procedures by which counties might implement the tourist development tax, including the use of a tourist development council. The statute directed that a County establish a tourist development council prior to levying a tax. The statute provided that the tourist development council was an "advisory" body. Section 125.0104(4)(e). (Appendix to Petition of Hobart C. Bishop, et al., A-31). The statute further specified that the tourist development council "shall prepare and submit to the governing board of the county for its approval a plan for tourist development." Section 125.0104(4)(c) (emphasis added). (Id., A-31).

Although Collier County established a tourist development council under the Tourist Development Act, the council declined to submit a plan to the County, taking it upon itself to protest the Tourist Development Act as "flawed." (R. 26). The Tourist

Development Act nowhere contemplated that the tourist development council might decline to discharge its responsibility to prepare a plan based on a disagreement with the enabling legislation; nor did the statute expressly address what might be done procedurally if that occurred.

Having consulted with its advisory council, the County Commission determined that it must deem the response it received as some sort of advisory proposal, which the County Commission had the prerogative to reject. Subsequently, the County enacted Ordinance No. 90-43, which was then approved by referendum.

The hotel operators contended in their challenge to the Ordinance that, although the tourist development council was an advisory body, the County could not levy a tax without somehow obtaining a plan for tourist development from that council. The trial court rejected the hotel operators' challenge. Having obtained the trial court's imprimatur of its Ordinance, the County proceeded to collect the taxes.

On appeal from the trial court's initial decision, the Second District reversed. See Freni v. Collier County, 588 So. 2d 291 (Fla. 2d DCA 1991). The Second District held on that prior appeal that the submission of a plan by the tourist development council was a procedural prerequisite to the levy of the tax.

After the issuance of the Second District's first decision, the petitioner taxpayers brought suit for refunds of the taxes that had been collected under Ordinance No. 90-43 prior to that decision. These taxpayers were not parties to the hotel operators' suit that culminated in the Second District's earlier decision. In that earlier suit, the hotel operators had asserted no claim for refunds; nor had they sought any disposition of taxes collected under the disputed ordinance.

While the petitioner taxpayers' suit for refunds was pending, but before it had proceeded to judgment, the Legislature passed a curative law ratifying the previously imposed taxes that

had been collected without benefit of a plan by the tourist development council. See Section 125.0104, Fla. Stat. (1993) ("Curative Act"). In the trial court, petitioners thereupon challenged the Curative Act on the ground that it violated due process by operating retroactively to validate the subject taxes. Erroneously believing that the Second District's prior decision controlled the outcome of this constitutional challenge, the trial court ruled in the taxpayers' favor and granted the taxpayers' motion for summary judgment on the issue of the County's liability to pay the tax refunds.

The Second District reversed. The court held that "[a]lthough the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist development." (Appendix to Petition of Hobart C. Bishop, et al., A-6).

Subsequently, petitioners sought review of the Second District's decision in the Florida Supreme Court. The Florida Supreme Court declined to review that decision.

SUMMARY OF ARGUMENT

In sustaining the validity of the curative legislation at issue here, the Second District adhered to well-settled precedent of this Court. Over the years, this Court has established guideposts on when and how the United States Congress or a state legislature may ratify taxes levied and collected in a procedurally improper manner, and the Second District faithfully followed those guideposts in this case. Further, although petitioners imply -- without arguing -- that the Second District's decision conflicts with decisions of the courts of other states, no such conflict exists. Accordingly, the petitions for a writ of certiorari should be denied.

ARGUMENT

Petitioners ask this Court to exercise its discretion to review the Second District's decision on the ground that it "is an affront to constitutional due process and stands as a dangerous precedent." (Petition of Hobart C. Bishop, et al., p. 4). Petitioners further exhort this Court to "confirm that its holdings" in prior decisions "continue to restrain legislatures from destroying vested claims for recovery of unauthorized taxes." (Ibid.; see also Petition of Richard D. Griffith, et al., p. 18).

There is nothing about petitioners' challenge or the Second District's decision that warrants plenary review by this Court. To the contrary, the decision in this case is quite pedestrian: It follows principles settled for almost a century by decisions of this Court.

1. In ruling in the County's favor, the Second District relied explicitly on this Court's decision in United States v. Heinszen, 206 U.S. 370 (1907). In Heinszen, the Court held that the legislature may ratify an unauthorized tax levy after it has been invalidated by the courts if the legislature would have had the power to authorize the levy in the first place in the manner in which the tax was imposed. Specifically, the Court stated that, when the legislature "possessed the power to have authorized [the]

imposition [of taxes] in the mode in which they were enforced," then "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Id. at 386.

The Court in Heinszen further held that, when the legislature exercises its prerogative to ratify a previously invalidated tax levy, this does not impermissibly impair any "vested" right of the taxpayer to prosecute a pending suit for refund to judgment. In this connection, in upholding the validity of a curative law ratifying taxes that this Court had previously invalidated, the Court in Heinszen held:

> Nor does the mere fact that, at the time the ratifying statute was enacted, this action was pending for the recovery of the sums paid, cause the statute to be repugnant to the Constitution. The mere commencement of the suit did not change the nature of the right. Hence, if it be conceded that the capacity to prosecute the pending suit to judgment was, in a sense, a vested right, certainly also the power of the United States to ratify was, to say the least, a right of as high a character. Id. at 387 (emphasis added).

In its first decision, the Second District had faulted the County's original imposition of the tax solely because of the County's failure to follow the procedural step of first obtaining a plan from the tourist development council. Petitioners freely conceded in seeking review by the Florida Supreme Court that "[t]he Legislature's 1987 enabling legislation could well have dispensed with or limited the role of TDC's [tourist development councils]" in the imposition of the disputed taxes. , (Bishop's Jur. Br., at 8)

This point is dispositive of petitioners' challenge. As Heinszen holds, and as the Second District recognized in its decision below, so long as the legislature could have authorized the

imposition of the tax in the first place in the manner imposed -- here, without benefit of a plan by the tourist development council -- then, "from the very moment of collection, a right in [the legislature] to ratify the transaction, if it saw fit to do so, was engendered." Heinszen, 206 US at 386. That is exactly what occurred in this case. Nonetheless, petitioners attack the Second District's decision for two reasons.

First, petitioners imply that Heinszen has somehow lost its force, by the passage of time or otherwise. But petitioners conceded at oral argument before the Second District that Heinszen is still good law. And it is in fact recognized today as the leading case in the area of the constitutionality of curative legislation.[1/]

Second, petitioners contend that a different decision of this Court should control the outcome of this case, namely, Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 US 338 (1922). But it is Forbes and not Heinszen that is distinguishable from the case at bar.

It should be noted that this Court itself has admonished that Forbes must be carefully limited to its particular facts. The Forbes decision contained dictum purporting to restrict the application of the doctrine of ratification. The Court in Forbes, however, limited that language virtually as it was uttered, noting in the Forbes opinion itself that "[i]t is true that the doctrine of ratification has been carried somewhat beyond the point that we indicate." 258 U.S. at 339. Subsequently, in discussing Forbes, this Court

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[1/] See, e.g., Canisius College v. United States, 799 F. 2d 18, 26 (2d Cir. 1986), cert. denied, 481 US 1014 (1987); Hochman, C., The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 704 (1960) (noting that it is well recognized that curative laws "include[] those statutes which ratify prior official conduct of government officers who have acted without the requisite authority," and noting that "[t]he leading case in this area is United States v. Heinszen & Co.").

U.S. at 339. Subsequently, in discussing Forbes, this Court emphasized that "[t]he case concedes the power of ratification . . . and necessarily recognized the subjection and obligation of persons and property to government . . . [and] the recognition precludes a misunderstanding of the case and its extension beyond its facts." Charlotte Harbor & N. Ry. co. v.-Welles, 260 US 8, 12 (1922) (emphasis added).

The facts of Forbes disclose that the government agency there levied tolls for the use of canal locks without the benefit of any express power to levy tolls whatsoever. As the Florida Supreme Court made clear in that case, "[a] careful examination of the acts of the Legislature [applicable to the Everglades district where the tolls were levied] [did] not reveal any express power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question." Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742, 82 So. 346, 351 (1919) (emphasis added). Thus, in the Second District, petitioners were relegated to arguing that, in Forbes, "the power to collect tolls was implied." (Answer Brief of Appellees Bishop, et al., p. 16 n. 12) (emphasis added). Here, by contrast, the County imposed its tax levy under the express statutory authority of the Tourist Development Act, albeit in a procedurally defective manner.[2/]

[2/] See also Graham v. Goodcell, 282 US 409, 427 (1931) ("defects in the administration of the law may be cured by subsequent legislation without encroaching upon constitutional right, although existing causes of action may thus be defeated"). Petitioners erroneously contend that the Second District's decision is somehow at odds with Graham. To the contrary, Graham supports the Second District's decision by recognizing that the legislature can enact curative legislation to rectify, among other things, failures by government officials to comply with statutory requirements.

By the same token, petitioners mistakenly rely on other decisions of this Court upholding the validity of various types of

(continued...)

This is significant because this Court recognized in Forbes that a broad legislative prerogative exists to ratify unauthorized "acts done in the name of the Government by those who assume to represent it." 258 U.S. at 339. Indeed, this Court has specifically held that curative legislation may apply not only to defeat a claim for refund but to override even a final judgment granting a tax refund where, as here, the taxing authority collected the taxes under the ostensible authority of a general law, even though the taxing authority was mistaken in its belief that the requisite authority existed. Rafferty v. Smith, Bell & Co., 257 U.S. 226 (1921). As this Court has explained, "a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of such judgment, a statute has been passed legalizing and ratifying such taxation." Hodges v. Snyder, 261 U.S. 600, 604 (1923). Petitioners have conceded in this case that Collier County's tax was enacted under the "ostensible legislative authority [of] Florida Statutes § 125.0104." (R. 458).

In addition, not only was there no enabling legislation in Forbes for the levy of any taxes, but the legislation that did exist affirmatively assured the public that no toll would be charged. Thus, the Court in Forbes emphasized that "[i]t would seem from the first decision of the Court below that the transaction [taxed] was not one for which payment naturally could have been expected." 258 U.S. at 340. The "first decision of the Court below," which invalidated the tolls prior to enactment of the curative law, pointed out that the legislation establishing the Everglades drainage district assured the public that it was "entitled

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2/(...continued)
pp. 8-11). Petitioners do not cite a single decision by this Court other than Forbes that struck down such legislation. At best, petitioners are reduced to distinguishing these other decisions. Petitioners do not and cannot distinguish this Court's decision in Heinszen, however, from this case. And Heinszen is controlling.

to the free use of such waterways." Forbes, 82 So. 346, 351 (Fla. 1919) (emphasis added).

Here, by contrast, far from assuring renters that no charge would be exacted for the privilege of renting accommodations in this state, the Tourist Development Act made plain that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977) (emphasis added). Indeed, prior to the time that petitioners paid the tax, the trial court had issued its initial decision upholding the tax.

Finally, petitioners concede that curative laws may be applied constitutionally to rectify a failure on the part of the taxing authority to follow statutorily required procedures. This Court in Forbes likewise acknowledged that curative laws may be applied to defeat taxpayer claims when the invalidity of the earlier agency action stems from a "technical defect" in the administration of a law, as distinguished from the omission of enabling legislation. 258 U.S. at 339. Here, the Second District invalidated the County's ordinance originally because the County enacted it in a procedurally improper manner. In fact, in the trial court, petitioners conceded that "a careful reading of the Amended Complaint . . . shows that Plaintiffs do not dispute or challenge the general authority of Defendants to enact a tourist development tax under Fla. Stat. § 125.0104, but rather challenge and dispute the defective procedures employed by Defendants in enacting a particular tourist development tax . . . ." (R. 520, 535). As the Second District correctly recognized, then, it is Heinszen and not Forbes that controls the outcome of this case.

Thus, the Second District's decision comports with long-established authority and well-accepted principles. Petitioners' admonitions about the far-reaching ramifications of the Second District's decision is merely the familiar argument of a party disappointed over the outcome of an appeal.

2. In the same vein, petitioners Hobart C. Bishop, et al., contend that this Court must intercede in this case because "the Board of Commissioners . . . deliberately and knowingly ignored the limits of its authority." (Petition of Hobart C. Bishop, et al., p. 10). Petitioners insist that a legislature may act to ratify prior tax levies only to cure "unintended defects" or "inadvertent" mistakes by agencies charged with the job of carrying out a tax. (Id. at 8-9). This argument is flawed for at least two reasons.

First, petitioners mischaracterize the County's actions. By the time the County collected the disputed taxes from petitioners, the trial court had denied the hotel operators' request to enjoin the referendum on the County's original Ordinance, the Second District had affirmed the decision denying the injunction, the Ordinance was in effect, and the trial court had entered its final order upholding the Ordinance. This confirms, at a minimum, that the County's authority to levy the tax in the first instance was colorable.

When the Second District reversed the trial court's initial decision, the County ceased levying the taxes and escrowed the moneys already collected. This is hardly a case, then, where the Florida Legislature has acted to ratify the actions of "rogue" tax collectors run amuck -- as petitioners contend. (Id. at 10).

More fundamentally, it can always be said -- in hindsight -- that a taxing authority acted in the face of procedural limitations on its authority, or in the absence of authority, in levying a tax that has been subsequently invalidated by the courts. Likewise, it can always be said that the tax collectors had reason to know that they were doing so, inasmuch as the taxpayers suspected it and the courts ultimately confirmed it. Yet, the courts have time and time again upheld the power of the legislature to ratify previously unauthorized or procedurally defective tax levies for the express purpose of cutting off taxpayer suits for refund.

For example, in Graham v. Goodcell, 282 U.S. 409 (1931), this Court ratified the collection of taxes by the Internal

Revenue Service after the statute of limitations had run on those taxes. The IRS collected those taxes based on a Treasury regulation that provided that the statute of limitations did not apply to collection of taxes by distraint proceedings, the common method of enforcing payment. Thus, the IRS did not allow the statute to run through inadvertence, but based on a deliberate judgment that the IRS could nonetheless collect the taxes due.

Ultimately, this Court in Graham repudiated the IRS's interpretation of its enabling legislation, and, predictably, taxpayers commenced claims for refunds based on this Court's decision. Against that background, Congress enacted legislation ratifying the IRS's collection of the disputed taxes. In sustaining that legislation, this Court acknowledged that "it was the purpose of the Congress that payments made in the circumstances described . . . should not be refunded." 282 U.S. at 418.

Likewise, in sustaining the legislation ratifying the collection of the disputed taxes in Heinszen, this Court recognized that the President had imposed those taxes by fiat, without authority, and this Court in three separate cases had conclusively held that the President was "without power . . . in the absence of express authority from Congress, to impose the tariff duties in question" and that the "imposition of the duties . . . was unlawful." 206 U.S. at 380 (emphasis added). Still, this Court upheld Congress' authority to ratify those taxes and thus to cut off pending suits for refund of the taxes.

Thus, petitioners' submission that the Second District in this case misapplied applicable law to uphold some kind of abuse of authority by either the County or the Florida Legislature is meritless.

3. In a final effort to demonstrate that this Court should grant the writ to review the Second District's decision in this case, petitioners Bishop, et al., imply – but do not directly argue – that the Second District's decision conflicts with decisions of other state courts. (Petition of Hobart C. Bishop, et al., pp. 12-14).

Petitioners Griffith, et. al, make no attempt to assert that such a conflict exists.

In this connection, petitioners Bishop, et al., point out that this Court dismissed an appeal (for want of a substantial federal question) from the state court decision in State ex rel. Emmerik v. Janklow, 304 N.W. 2d 700 (1981), in which the South Dakota Supreme Court rejected a constitutional challenge to state legislation that ratified taxes collected twelve years earlier. Plainly, the Second District's decision in this case does not conflict with either the ruling of the South Dakota Supreme Court upholding such legislation or with the decision of this Court in Emmerik dismissing an appeal from the state court's decision for want of a substantial federal question. If anything, this Court's decision in Emmerik further demonstrates that the Second District's decision in this case accords with governing law.

Petitioners insist, however, that, in dissent in Emmerik, Justice White suggested that the decision in Emmerik was in "apparent" conflict with a decision of the Maryland Court of Appeals in Washington National Arena Limited Partnership v. Treasurer, 287 Md. 38, 410 A.2d 1060, cert. denied, 449 U.S. 834 (1980). As we have shown, the Second District's decision in this case does not conflict with Emmerik. Nor does it conflict with Washington National.

In Washington National, a county was given legislative authority in 1968 to impose a recordation tax at a rate of $1.10. In the face of that authority, the county imposed a tax at a rate of $1.65. Eight years later, in 1976, the state legislature enacted a statute purporting to authorize the county's collection of the higher tax. The court in Washington National held that the case was more like this Court's decision in Forbes than Heinszen because, in both Forbes and Washington National, the taxing authorities had acted to impose a tax in the face of affirmative assurances by the state legislature as to "what, if anything, should be charged by the government." 410 A. 2d at 1067.

Specifically, the court in Washington National emphasized that this Court in Forbes had "pointed out that, in light of the decision of the Florida court below interpreting the Commissioner's statutory authority, the 'transaction was not one for which payment naturally could have been expected.'" Ibid., quoting Forbes, 258 U.S. at 340. As we have discussed, the legislation at issue in Forbes affirmatively assured the public that use of the waterways would be free.

Likewise, in Washington National, the court pointed out that the county had acted to collect the higher tax in the face of legislation expressly assuring the public that the tax would be less. Because the discrepancy related to the critical issue of the amount of the tax, the court in Washington National held that the legislature could not renege on the assurance that it had previously given on this issue.

As we have discussed, in this case, in contrast to Forbes and Washington National, at the time petitioners rented accommodations the Tourist Development Act gave no assurances that petitioners would not be taxed or that they would be taxed at some favorable rate. To the contrary, in enacting the Tourist Development Act the Florida Legislature made plain all along that "every person" who rents accommodations for a specified term "is exercising a privilege which is subject to taxation." Section 125.0104(3)(a), Fla. Stat. (1977).

Further, the court in Washington National hastened to acknowledge that where, as here, the taxing authority has failed to comply with a procedural or technical requirement of the enabling statute, the legislature can constitutionally ratify the defective tax levy after the fact. 410 A. 2d at 1067. It is precisely that authority that the Second District sustained in holding, "Although the tourist tax was subject to invalidation for want of following the procedural requirements of the Act, the legislature acted within its capacity in ratifying the tax by providing a means to correct the procedural defect of the absence of a plan for tourist

development." (Appendix to Petition of Hobart C. Bishop, et al., A-6) (emphasis added).

Accordingly, the Second District's decision is consistent with all the cases upon which petitioners rely.

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

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Respectfully submitted,

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